Supreme Court, U.S.
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No._____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1993

RAYFORD LONG, Petitioner

V.

DONNA E. SHALALA, SECRETARY
OF HEALTH AND HUMAN SERVICES

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

ANTHONY W. BARTELS
316 South Church
P. O. Box 1640
Jonesboro, AR 72401

ATTORNEY FOR PETITIONER

QUESTION PRESENTED

The question presented in this case is whether the Secretary of Health and Human Services should be permitted to avoid compliance with 42 U.S.C. § 402 (j)(5).

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DONNA E. SHALALA, SECRETARY
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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Rayford Long petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit.

OPINIONS BELOW

The opinion of the District Court and the opinion of the Eighth Circuit Court of Appeals are unreported, but are attached hereto as Appendix A and B respectively. The Eighth Circuit Court of Appeals' order denying petitioner's motion for rehearing is attached hereto as Appendix C.

JURISDICTION

The judgment of the Court of Appeals (Appendix B) was entered on March 29, 1994. The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

STATUTES INVOLVED

The relevant provision of 42 U.S.C. § 402 (j) (5) are set forth in Appendix D.

STATEMENT

This case involves 42 U.S.C. § 402 (j) (5), which pertains to failure of an individual to file a written application for monthly Social Security insurance benefits because of misinformation provided to such individual by an officer or employee of the Social Security Administration (SSA) relating to such individual's eligibility for benefits.

Rayford and Faye Long were married for 21 years until their divorce in 1964. On July 28, 1974, Faye Long passed away.

On August 27, 1987, Rayford Long filed an application for widower's

benefits as the surviving divorced spouse of Faye Long. On October 11, 1987, he was awarded benefits retroactive to July 1986. Mr. Long subsequently requested reconsideration of the entitlement date, claiming that he had attempted to file a claim for widower's benefits on June 1, 1985, but failed to do so because he was told by an SSA employee that he was ineligible.

Mr. Long's claim was denied through the administrative stages, and he brought suit in the United States District Court for the Eastern District of Arkansas on April 20, 1990. On April 13, 1990, the District Court granted the Secretary's motion for summary judgment, affirmed the final determination of the Secretary, and dismissed Mr. Long's complaint. On April 20 1990, Mr. Long requested that the District Court alter or amend its judgment in view of the recent amendment to 42 U.S.C. § 402 (j). The District Court

granted the request and directed that the case be remanded to the Secretary for re-evaluation in light of 42 U.S.C. § 402 (j) as amended.

Upon remand, the Secretary determined that Mr. Long's failure to file a written application in June 1985 was not due to misinformation given by an SSA employee. Mr. Long sought judicial review of the Secretary's decision. In an order entered March 31, 1993, the District Court denied the claim and affirmed the Secretary's decision.

Mr. Long appealed the District Court's judgment to the Eighth Circuit Court of Appeals. On March 29, 1994, the Court of Appeals affirmed the District Court's judgment.

REASONS FOR GRANTING THE PETITION

Under the terms of the Social Security Act, widower's insurance benefits are only available to one who, in addition to meeting other requirements,

files an application. 42 U.S.C. § 402 (f)(1). Only written applications satisfy the requirement of filing an application. 20 C.F.R. § 404.602-404.614 (1992).

Until 1989, the law was that Social Security was not estopped from applying its written application requirement and denying retroactive benefits to an individual who failed to file a written application, regardless of whether that individual's failure to file was due to erroneous information obtained from a Social Security employee regarding the individual's eligibility. Schweiker v. Hansen, 450 U.S. 785 (1981).

In 1989 Congress amended Section 202 (j) of the Social Security Act provide that in the event an individual failed to file a written application for benefits "by reason of misinformation provided to such individual by any officer or employee of the Social Security Administration relating to such individual's eligibility

for benefits" such individual should be deemed to have applied for benefits on either the date he received such misinformation or the date he or she met all other requirements for entitlement to such benefits. This amendment was in response to testimony given by several witnesses during hearings held by the House of Representatives Ways and Means Subcommittee on Social Security. The witnesses described how they or others they knew had irretrievably lost benefits due to inaccurate or misleading information supplied by SSA workers. See generally Proposals to Improve the Quality of Services Provided by the Social Security Administration: Hearings Before the Subcom. on Social Security of the House of Representatives Comm. on Ways and Means, 100th Cong., 2d Sess. 2 (1989). The amendment, codified as 42 U.S.C. § 402 (j) (5), reflects a strong congressional intent to correct the injustice suffered

by eligible claimants who lose benefits as a result of having received misinformation from the SSA.

The Court of Appeals' decision in Rayford Long's case effectively permits the Secretary of Health and Human Services to avoid compliance with 42 U.S.C.§ 402 (j) (5).

Rayford Long testified that he visited the Social Security Office in Jonesboro, Arkansas in 1985 to apply for widower's benefits and was told by an SSA employee that he was not eligible because he was divorced from his wife at the time of her death. His friend, Aubrey H. Adamson, stated in a sworn affidavit that he drove Mr. Long to the Jonesboro SSA office in June 1985 and that he heard an SSA employee tell Mr. Long that he was not eligible for widower's benefits. Mr. Long also testified that on subsequent occasions he spoke with at least four different employees in the Jonesboro

office and was told consistently that he was not eligible for widower's benefits *because he and his wife were not married* at the time of her death. The Secretary presented statements from employees of the Jonesboro office who said that they had "no recollection" of discussing widower's benefits with Mr. Long. The Secretary also introduced a statement from the Jonesboro office administrator that the employees named by Mr. Long would not have advised him about widower's benefits because that was not within their job description. Relying on this evidence, the Secretary of HHS found that Mr. Long had never made an office visit in 1985.

The Court of Appeals found that two competing versions about whether Mr. Long visited the Jonesboro office in 1985 could be drawn from the evidence.

> Long and Adamson said that Long made the visit. The employees of the Jonesboro office said that they did not recall such a visit. The ALJ chose to believe the Jonesboro office employees and the evidence

> that they did not handle widower's benefits claims as part of their work.

(Appendix B, page 30). It upheld the ALJ's credibility determination under the substantial evidence rule as defined in the case of Robinson v. Sullivan, 956 F. 2d 836, 838 (8th Cir. 1992)--"if it is possible to draw two inconsistent positions from the evidence and one of those positions represents the agency's findings, we must affirm the decision."

This decision permits the SSA to circumvent 42 U.S.C. § 402 (j) (5) based upon nothing more than poor memories or general job descriptions. The mere failure to remember one individual's visit, among the many hundreds of other visits each year, does not constitute substantial evidence to support an ALJ's decision that the visit did not occur. This is especially true in the present case, given the number of applicants served by the office and the fact that the

employees' statements were made in 1990, some five years after the alleged visit. The Secretary's evidence that the four Jonesboro office employees named by Mr. Long did not handle widower's benefits claims as part of their regular work also does not support the ALJ's decision. In discussing this question, the court identified the wrong SSA employee as the person who supposedly told Mr. Long that he was ineligible in 1985. The court stated that Betty Radcliff was the woman Mr. Long named as the employee who misinformed him about widower's benefits during his 1985 visit. The Secretary's evidence indicated that Ms. Radcliff was a computer input clerk in 1985 who had no occasion to interview the public about claims. In fact, Mr. Long identified Essie Triggs as the employee he talked with in June 1985. The Secretary's evidence regarding Ms. Triggs is less than substantial. The office administrator

stated that Ms. Triggs worked as a developmental clerk in 1985 and that it was unlikely that she discussed entitlement issues with applicants because such duties were not included in her job description. The record, however, indicates that Ms. Triggs was involved to some extent in claims-related matters, as shown by her 1984 letter to Mr. Long requesting that he complete and return certain hearing request forms and that he call the SSA office to speak directly with her. Furthermore, unlike the other named employees, there is no statement in the record from Ms. Triggs herself regarding Mr. Long's 1985 visit.

Under Robinson, the possibility of drawing a conflicting position from the evidence must be reasonable. Here, it is remote. The **only** evidence in the record that Ms. Triggs did not provide erroneous information to Mr. Long in 1985 is the statement from the office administrator

that it was not within her job responsibilities to discuss claims with applicants--an assertion itself that is contradicted by the record. The substantial evidence rule requires more.

In its decision, the U.S.Court of Appeals for the Eighth Circuit stated that it "must affirm" the Secretary's decision because two different conclusions could be reached based on the evidence in Rayford Long's case (App.32) (emphasis added).

On this issue, the Supreme Court stated in Consolo v. Federal Maritime Comm., 383 U.S. 607, 86 S. Ct. 1018, 16 L. Ed. 2d 131 (1966) that "the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence." Id. 383 U.S. at 620, 86 S. Ct. at 1026 (emphasis supplied). This is not the same as saying that the Secretary's decision "must be affirmed." We believe the Eighth

Circuit has strayed from the standard by which a decision of the Secretary must be reviewed, i.e., whether that decision is supported by substantial evidence on the record as a whole.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully Submitted,

ORIGINAL SIGNED BY

Anthony W. Bartels

ANTHONY W. BARTELS
Attorney at Law
316 South Church
Jonesboro, AR 72401
Phone: (501) 972-5000

May 25, 1994.

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
JONESBORO DIVISION

RAYFORD LONG (SSN: 432-26-6426) PLAINTIFF

vs.

DONNA E. SHALALA, Secretary, Health & Human Services DEFENDANT

JUDGMENT

Pursuant to the Memorandum and Order filed in this matter this date, it is Considered, Ordered and Adjudged that this case be, and it hereby is, dismissed; the relief sought is denied.

DATED this 26th day of March, 1993.

/S/John J. Forster, Jr.
UNITED STATES MAGISTRATE JUDGE

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
JONESBORO DIVISION

RAYFORD LONG (SSN: 432-26-6426) PLAINTIFF

vs.

DONNA E. SHALALA, Secretary, Health & Human Services DEFENDANT

ORDER

By it's [sic] Amended Order of July 30, 1990, the Court remanded for reevaluation pursuant to the recently amended 42 U.S.C. § 402 (j) (5).

That statute, in pertinent part, specifies:

> In any case in which it is determined to the satisfaction of the Secretary that an individual failed as of any date to apply for monthly insurance benefits under this title by reason of misinformation provided to such individual by any officer or employee of the Social Security Administration relating to such individual's eligibility for benefits under this title, such individual shall be deemed to have applied for such benefits on the later of --
>
> (A) the date on which such misinformation was provided to such individual, or

> (B) the date on which such individual met all requirements for entitlement to such benefits (other than application therefor).

The Secretary has filed a supplemental transcript of the pleadings on remand. The ALJ entered a decision October 22, 1991, finding that plaintiff was not entitled to widower's benefits from May 19, 1985, through July 31, 1986 (Tr. 265).

The Appeals Council found no basis to assume jurisdiction, thereby making the ALJ's decision the final decision of the Secretary. (Tr. 255-56)

Plaintiff filed a motion for summary judgment, arguing that the ALJ's decision is not supported by substantial evidence.

The Court finds that the ALJ's decision is based on substantial evidence on the record as a whole.

The Secretary was not satisfied that claimant failed to apply for benefits based on misinformation provided by a

Social Security Administration employee. (Tr. 264)

Plaintiff's motion for summary judgment is denied. The determination of the Secretary is affirmed and plaintiff's complaint is dismissed with prejudice.

IT IS SO ORDERED.

DATED this 26th day of March, 1993.

/S/John J. Forster, Jr.
UNITED STATES MAGISTRATE JUDGE

APPENDIX B

United States Court of Appeals
FOR THE EIGHTH CIRCUIT

93-1857

Rayford Long, S.S.N.: 432-26-6426,	*	Appeal from the United States District Court for the Eastern District of Arkansas
Appellant,	*	
Donna E. Shalala, Secretary of Health and Human Services of the United States,	*	
Appellee.	*	

Submitted: November 9, 1993

Filed: March 29, 1994

Before HANSEN, Circuit Judgment, JOHN R. GIBSON,* Senior Circuit Judge, and MELLOY,** District Judge.

HANSEN, Circuit Judge.

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*The HONORABLE JOHN R. GIBSON was an active judge at the time this case was argued and became a Senior Circuit Judge on January 1, 1994.

**The HONORABLE MICHAEL J. MELLOY, Chief United States District Judge for the Northern District of Iowa, sitting by designation.

Rayford Long appeals the district court's[1] order affirming the decision of the Secretary of Health and Human Services ("the Secretary") denying Long's request to have his award of widower's benefits made retroactive to June of 1985 instead of to July of 1986, the time he made an application for Supplemental Security Income (SSI) benefits. Long argues that under 42 U.S.C. § 402 (j) (5), his award should have been made retroactive to June of 1985 because his failure to apply for widower's benefits until July of 1986 was the result of misinformation he received about his eligibility for benefits from employees of the Social Security Administration (SSA) in June of 1985. We find that although the question is quite close, there is substantial evidence to

---

1. The Honorable John F. Forster, Jr., United States Magistrate Judge for the Eastern District of Arkansas, presiding by the consent of the parties pursuant to 28 U.S.C. § 636 (c).

support the Secretary's decision and we affirm the district court.

I.

Raymond Long was married in 1943, and divorced in 1964. His wife remarried and died in 1973. Long turned 60 in 1985. Long asserts that he decided to apply for widower's benefits sometime in 1985 after hearing from a family member that he might be eligible. Long alleges that on or about June 1, 1985, Aubrey Adamson drove him to the Social Security Office in Jonesboro, Arkansas, and that Long talked with four named women in the office about widower's benefits. Long says the women told him he was not eligible for widower's benefits because he and his wife were divorced at the time she died. He contends that the SSA employees encouraged him to apply for SSI benefits instead, which he declined to do because he had recently been denied SSI benefits on two occasions. The Jonesboro Social Security

Office has no record of his alleged visit, and the employees of the office have no recollection of his alleged visits.

Approximately one year later, in July of 1986, Long applied for SSI benefits. He was awarded SSI benefits in September of 1987. Long alleges that about that time he read an SSA handbook and discovered that he should have been awarded widower's benefits. He made an application for the widower's benefits, which the SSA awarded on October 11, 1987. The SSA made the award retroactive to his July 1986 application for SSI benefits.

Long requested that the award of widower's benefits be made retroactive to June of 1985, the time he alleges he first attempted to apply for the benefits and was told by SSA employees that he was not eligible. The request was denied on the ground that he did not file an application for any benefits before July of 1986. Long requested and received a hearing

before an administrative law judge (ALJ) on the denial of the retroactive award. The ALJ denied his request to make the award retroactive to 1985. The Administrative Appeals Council denied his request for review.

Long then filed an action in the United States District Court to review the ALJ's determination. The district court granted the Secretary's motion for summary judgment, but subsequently amended the order and remanded to the Secretary to determine the effect of a then-recent amended to 42 U.S.C. § 402 (j). The amended version of 42 U.S.C. § 402 (j) (5) allowed an applicant who relied on misinformation from an SSA employee in failing to file an earlier application for benefits to receive benefits retroactive to the date the misinformation was provided or the date the applicant qualified for benefits, whichever was later.

On remand, the ALJ considered the question without an additional hearing and found that Long's failure to apply for benefits before July of 1986 was not the result of misinformation he received from an SSA employee. The ALJ specifically found (1) that the evidence did not support Long's contention that he visited the Jonesboro Social Security Office in June of 1985 and (2) that he did not receive any misinformation about widower's benefits in 1985 from SSA personnel. Accordingly, the ALJ again denied Long's request to make the award of widower's benefits retroactive to June of 1985. The appeals council declined to assume jurisdiction over the case. (Tr. 255.) Long again sought review in the district court and the district court affirmed the ALJ's decision. Long then filed this appeal.

II.

Long argues that the district court erred in affirming the ALJ's finding that Long did not rely on misinformation from an SSA employee and, therefore, was not entitled to the benefit of 42 U.S.C. § 402 (j) (5). Our standard of review in this case is as follows:

> Our review of the agency decision is limited to whether there is substantial evidence on the record as a whole to support the Secretary's decision. This requires us to do more than merely parse the record for substantial evidence supporting the Secretary's decision. We also must consider evidence in the record that detracts from the weight of the decision. Substantial evidence is less than a preponderance, but enough so that a reasonable mind might find it adequate to support the conclusion.

Robinson v. Sullivan, 956 F. 2d 636, 638 (8th Cir. 1992) (internal citations omitted).

The key questions in this case are whether Long made a 1985 visit to the Jonesboro Social Security Office to discuss his eligibility for widower's

benefits and, if so, what if anything he was told. Long testified that he made the office visit in June of 1985, discussed widower's benefits with named employees of the office, and was told he did not qualify. Long also presented the affidavit of his friend, Aubrey Adamson, who asserted that he accompanied Long to the Jonesboro office in June of 1985, and heard an SSA employee tell Long he was not qualified for widower's benefits. The Secretary presented statements from employees of the Jonesboro office who stated that they did not remember a 1985 visit from Long. The Secretary also introduced evidence that the Jonesboro office did not have any record of a 1985 visit from Long. Further, the woman Long named as the employee who actually told him he was ineligible, Betty Radcliff, was a computer input clerk in 1985 who had no occasion to interview the public about claims. Of the other three employees Long

named, one worked solely on SSI claims and would not have handled a Title II widower's benefits applicant, one worked as a development clerk, and no one with the fourth name supplied by Long was ever employed in the Jonesboro office. The ALJ found that Long never made an office visit in 1985, relying on the evidence introduced by the Secretary.

We first find that the Secretary's evidence regarding the lack of a written record of Long's visit does not support the ALJ's decision. There is no evidence that the Jonesboro office kept a record of visitors who called on the office but did not end up applying for benefits. Even without this evidence, however, there were two competing versions about whether Long made the visit to the Jonesboro office in 1985. Long and Adamson said that Long made the visit. The employees of the Jonesboro office said that they did not recall such a visit. The ALJ chose to

believe the Jonesboro office employees and the evidence that they did not handle widower's benefits claims as part of their work.

"We are to give great deference to the ALJ's determination of credibility." Britton v. Sullivan, 908 F. 2d 328, 331 (8th Cir. 1990) (internal quotation omitted). We may not reject an ALJ's credibility determination if it is supported by substantial evidence. Johnson v. Heckler, 744 F. 2d 1333, 1338 (8th Cir. 1984). Here, we find that the ALJ's credibility determination is supported by substantial evidence as defined in Robinson. Moreover, "if it is possible to draw two inconsistent positions from the evidence and one of those positions represents the agency's findings, we must affirm the decision." Robinson, 956 F. 2d at 838. We find that it was possible for the ALJ to draw two inconsistent positions from the evidence

-- either Long made the 1985 visit and received the erroneous advice or he did not -- and the ALJ found that he did not. Hence, we conclude, based on Robinson, that we must affirm.

IV.

The district court did not err in finding that the ALJ's decision denying Long's request to make his award of benefits retroactive to June of 1985 was supported by substantial evidence. Accordingly, we affirm the judgment of the district court.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS,
EIGHTH CIRCUIT.

APPENDIX C

United States Court of Appeals
FOR THE EIGHTH CIRCUIT

93-1857

Rayford Long, S.S.N.: 432-26-6426,	*	
	*	Appeal from
	*	the United
Appellant,	*	States
	*	District
Donna E. Shalala, Secretary	*	Court for
of Health and Human Services	*	the Eastern
of the United States,	*	District of
	*	Arkansas
Appellee.	*	

The court has treated appellant's Motion to File Belated Petition for Rehearing as a motion to recall the mandate and for rehearing. As so construed the motion is denied.

May 4, 1994

Order Entered at the Direction of the Court:

/s/Michael E. Gans

Clerk, U. S. Court of Appeals, Eighth Circuit.

APPENDIX D

RELEVANT STATUTORY PROVISIONS

42 U.S.C. § 402 (j) provides in pertinent part:

> (j) Application for monthly insurance benefits
>
> (1) Subject to the limitations contained in paragraph (4), an individual who would have been entitled to a benefit under subsection (a), (b) (c) (d), (e) (f) (g), or (h) of this section for any month after August 1950 had he filed application therefor prior to the end of such month shall be entitled to such benefit for such month if he files application therefor . . . .
>
> . . . .
>
> (4) (A) Except as provided in subparagraph (B), no individual shall be entitled to a monthly benefit under subsection (a), (b), (c), (e), or (f) of this section for any month prior to the month in which he or she files an application for benefits under that subsection if the amount of the monthly benefit to which such individual would otherwise be entitled for any such month would be subject to reduction pursuant to subsection (q).
>
> (B) (i) If the individual applying for retroactive benefits is a widow, surviving divorced wife, or widower and is under a disability (as defined in section 423 (d) of this title), and such individual would, except for subparagraph (A),

be entitled to retroactive benefits as a disabled widow or widower or disabled surviving divorced wife for any month before attaining the age of 60, then subparagraph (A) shall not apply with respect to such month or any subsequent month.

(ii) Subparagraph (A) does not apply to a benefit under subsection (e) or (f) of this section for the month immediately preceding the month of application, if the insured individual died in that preceding month.

(iii) As used in this subparagraph, the term "retroactive benefits" means benefits to which an individual becomes entitled for a month prior to the month in which application for benefits is filed.

(5) In any case in which it is determined to the satisfaction of the Secretary that an individual failed as of any date to apply for monthly insurance benefits under this title by reason of misinformation provided to such individual by any officer or employee of the Social Security Administration relating to such individual's eligibility for benefits under this title, such individual shall be deemed to have applied for such benefits on the later of --

(A) the date on which such misinformation was provided to such individual, or

(B) the date on which such individual met all requirements for entitlement to such benefits (other than application therefor).